Office-Supreme Court, U.S.
FILED
MAY 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1563

In the Supreme Court of the United States

OCTOBER TERM, 1980

HOWARD TRUCKING COMPANY, INC., AND
NORTH-WEST INSURANCE CO., PETITIONERS

v.

EDGAR J. BOUDLOCHE AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a truck driver who regularly spends some of his working time performing longshoring operations and who was injured at the water's edge while loading small boats onto his truck was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-39a) is reported at 632 F. 2d 1346. The opinion of the Benefits Review Board (Pet. App. 11a-33a) is reported at 11 B.R.B.S. 687. The decision of the administrative law judge (Pet. App. 1a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1980. The petition for a writ of certiorari was filed on March 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Howard Trucking Company, Inc. is engaged in the business of transporting oilfield and marine equipment used in drilling for oil and gas offshore and on land (Pet. App. 3a, 13a, 35a). Respondent Edgar Boudloche was employed by Howard Trucking as a truck driver. Boudloche drove a large rig with a flatbed trailer equipped with a winch. At least 50% of his runs required him to pick up or deliver equipment at a dock. The remainder of his time was spent hauling heavy oilfield equipment from one land-based site to another (*ibid.*).

At approximately 10% to 20% of the docks to which Boudloche was sent, no loading or unloading equipment or personnel were available, and therefore Boudloche did the loading and unloading work by himself (Pet. App. 5a, 13a, 35a). When assigned to pick up equipment, he had to board a barge, hook up his winch lines to the cargo, and hoist it onto the flatbed trailer. When delivering equipment or materials, he had to load the items onto a barge and secure the cargo on board. Boudloche estimated that two or three times a week he had to load or unload cargo without assistance from anyone (*id.* at 5a, 13a).

At the remaining docks where Boudloche picked up or delivered equipment, laborers and cranes were usually available to move equipment between the truck and the barge. Even at these locations, however, Boudloche was expected to assist in the loading and unloading process, in order to develop good will for his employer (Pet. App. 4a, 13a, 35a). On rare occasions, he had to drive his truck onto a barge and secure the trailer to the barge. The barge would then be towed out to offshore drilling platforms where Boudloche would be required to help unload equipment or materials from the trailer to the platform (*id.* at 4a).

On February 5, 1975, Boudloche was sent to the Conoco dock at Belle River, Louisiana, to pick up several small boats used in oil and gas drilling operations. A barge had brought the boats to the dock. Boudloche found them there afloat and tied to keep them from drifting (Pet. App. 5a). The dock was an unequipped and unmanned facility that was nothing more than a gravel and shell-covered slope leading down into the water. Boudloche backed his truck to the water's edge and ran his winch line from the back of the cab along the trailer bed to the front of the first boat. He then winched the boat out of the water and onto the trailer. He loaded the second boat in the same manner. The third boat was substantially heavier than the first two. With the voluntary assistance of several men in the vicinity, Boudloche attempted to load the boat by lifting its back end so that it could be pushed over the rolling tailboard of the truck (*id.* at 5a-6a, 14a-15a). Boudloche was seriously injured when the boat slipped and fell on him. Since his injury, Boudloche has been unable to perform manual labor and has been instructed by his doctor not to lift more than 20 pounds (*id.* at 6a).

2. Respondent Boudloche sought compensation for temporary and continuing total disability under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* Petitioners, Howard Trucking Company and its workers' compensation insurance carrier, contested the claim, asserting that at the time of his injury Boudloche was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act. Petitioners also disputed the nature and extent of Boudloche's disability (Pet. App. 2a, 12a). After a hearing, an administrative law judge found that Boudloche's duties on the job "involved not only hauling equipment and materials but also loading and unloading such items directly from his truck to vessels or directly from vessels to his truck, often times without assistance" (*id.* at 7a). Nevertheless, the

administrative law judge concluded that Boudloche was not "engaged in maritime employment" because the cargo he handled was used in drilling for oil and gas, and "[h]e never handled commercial goods and commodities which had been or were destined to be transported in vessels used in trade or commerce" (*id.* at 8a). The administrative law judge accordingly denied the claim for compensation without addressing the disability issue (*id.* at 9a-10a).

Respondent Boudloche appealed to the Benefits Review Board, in accordance with 33 U.S.C. (& Supp. III) 921(b). In a divided decision (Pet. App. 11a-33a), the Board affirmed the administrative law judge's decision and order but rejected her reasoning (*id.* at 17a). Chief Administrative Appeals Judge Smith took the view that, regardless of the nature of the work the employee was performing at the time of his injury, the "status" test of Section 2(3) is satisfied only if "a substantial portion" of the employee's overall duties is "maritime in nature" (*id.* at 19a-20a). According to the Chief Judge's calculations, no more than 5% of Boudloche's actual work time was spent loading or unloading cargo "at unequipped dock facilities where he had to board vessels" (*id.* at 18a). The Chief Judge considered this an insubstantial fraction of Boudloche's total activities on the job (*id.* at 20a).[1] Administrative Appeals Judge Kalaris concurred in

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[1]The Chief Judge admitted that, under the court of appeals' decision in *Thibodaux* v. *Atlantic Richfield Co.*, 580 F. 2d 841 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979), an employee may be covered under the Act *either* if he was engaged in maritime employment at the time of his injury *or* if his overall occupation is properly characterized as "maritime employment" within the meaning of Section 2(3). Without endorsing the alternative tests recognized in *Thibodaux*, the Chief Judge stated that the Board's result was "the same as that which would be reached by applying the *Thibodaux* analysis" (Pet. App. 22a). In the Chief Judge's view, respondent Boudloche "was not engaged in a maritime activity at the time of his injury" (*ibid.*). In support of this position, the Chief Judge cited a footnote in *Northeast Marine Terminal Co.* v.

this aspect of the Chief Judge's opinion.[2] Accordingly, the majority decided that, because no substantial portion of Boudloche's duties was maritime in nature, he was not engaged in maritime employment within the meaning of Section 2(3) (*id.* at 24a).

Administrative Appeals Judge Miller dissented (Pet. App. 24a-33a). He would have ruled that Boudloche satisfied Section 2(3)'s "status" test because he was engaged in longshoring operations, and therefore in maritime employment, at the time of his injury.

Respondent Boudloche sought judicial review of the Board's decision, under 33 U.S.C. 921(c). The court of appeals reversed, holding that Boudloche was a maritime employee within the meaning of the Act. Relying on *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), and *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 81 (1979), the court ruled that any employee who spends "at least some" of his time performing longshoring operations is engaged in maritime employment. In the court's view, the Board's requirement that in order to qualify as a maritime employee a "substantial portion" of one's duties must be maritime in nature is inconsistent with the opinions in *Caputo* and *Ford*. Accordingly, the court remanded the case to the Board for further proceedings concerning the nature and extent of Boudloche's disability.

Caputo, 432 U.S. 249, 266-267 n.27 (1977), where this Court reproduced the comments of the relevant congressional committees on the coverage of the Act as amended in 1972. The committee reports stated, in part, that "employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered * * *." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972). See pages 10-11 & note 7, *infra*.

[2]Judge Kalaris expressly declined to join that portion of the Chief Judge's opinion dealing with *Thibodaux* and the question whether Boudloche "was performing maritime activity at the time of injury" (Pet. App. 24a).

ARGUMENT

1. The decision of the court of appeals is correct and follows directly from this Court's statement in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), that "when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend *at least some of their time* in indisputably longshoring operations, and who, without the 1972 Amendments, would be covered for only part of their activity" (emphasis added).[3] Respondent Boudloche unquestionably spends some of his time in performing longshoring operations, and, under *Caputo*, this is sufficient to establish his maritime employment. Although the Third Circuit has said that an employee's "primary duties" must be maritime in nature if he is to be considered "engaged in maritime employment" as a matter of occupation, the leading decision of this kind antedated *Caputo*,[4] and, more recently, the Third Circuit has acknowledged that, in light of *Caputo*, the "primary duties" test "may have reflected too narrow an interpretation" of the Act. *Dravo Corp.* v. *OSHRC*, 613 F. 2d 1227, 1233 n.9 (1980). Accordingly, we do not believe that the court of appeals' rationale in the present case conflicts with the governing law in any other circuit.[5]

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[3]See also *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 n.18 (1979).

[4]See *Maher Terminals, Inc.* v. *Farrell*, 548 F. 2d 476 (3d Cir. 1977). See also *Dravo Corp.* v. *Banks*, 567 F. 2d 593 (3d Cir. 1977).

[5]*White* v. *Newport News Shipbuilding & Dry Dock Co.*, 633 F. 2d 1070 (4th Cir. 1980), which petitioners also cite in support of their allegation of a conflict among the circuits, entailed only an observation by the court that the employee's primary duties were maritime and that therefore the status test would be satisfied even under the approach followed by the Third Circuit in *Maher Terminals, Inc.* v. *Farrell, supra*. The court in *White* cited with approval its earlier decision in *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F. 2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), where it held that a maintenance man at a foundry was a maritime employee under the Act.

Moreover, completely apart from the question whether respondent Boudloche performed sufficient maritime tasks to be "engaged in maritime employment" throughout the working day, he was injured in the course of performing a task that was plainly maritime, and this fact alone is sufficient to satisfy the "status" test in Section 2(3). Indeed, it is difficult to understand why the Benefits Review Board and the court of appeals chose to decide this case by reference to the percentage of Boudloche's work that can properly be characterized as maritime. The critical point is that, notwithstanding Chief Judge Smith's remarks concerning truck drivers who merely pick up stored cargo for transshipment (Pet. App. 20a), the act of transferring cargo directly from water transportation to land transportation is quintessentially a maritime operation, even when it is performed by someone who spends most of his working hours driving a truck. As Judge Miller observed in his dissent from the Benefit Review Board's decision, "when a truck driver becomes a longshoreman by assuming a longshoreman's duties, he submits himself to the same risks and is entitled to the same protections against injury and disability" (*id.* at 33a). If an employee is injured in the performance of maritime work, it makes no difference whether his occupation, considered as a whole, qualifies as "maritime employment" within the meaning of Section 2(3). This is precisely what the Fifth Circuit recognized in *Thibodaux* v. *Atlantic Richfield Co.*, 580 F. 2d 841, 844 (1978), cert. denied, 442 U.S. 909 (1979), when it referred to "the alternative tests of occupation and activity at the time of injury * * *." Here, respondent Boudloche was injured as he took cargo from

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even though approximately three-fourths of the foundry's work involved the production of non-maritime items. See also *Garvey Grain Co.* v. *Director, OWCP*, 639 F. 2d 366 (7th Cir. 1981) (worker is covered if he spends some of his time engaged in longshoring operations).

the water and attempted to load it onto his truck. Surely, as Judge Miller said (Pet. App. 29a-30a), this task is not rendered any less maritime in character because the cargo was itself a boat rather than goods or equipment.

Because the court of appeals' decision regarding the maritime nature of respondent Boudloche's employment is correct and does not conflict with the view of any other circuit, and because the result reached by the court of appeals is in any event justified by the nature of Boudloche's activity at the time of his injury, further review is not warranted. At the very least, because the court of appeals' decision does not finally dispose of the claim for benefits in this case, further review at this stage would be premature. Petitioners may raise their objections to the court of appeals' coverage ruling, together with any objections they may have to the decision on the nature and extent of respondent Bouldloche's disability, on review of any compensation order that may be entered on remand.

2. Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *." 33 U.S.C. 902(3).[6] In *Northeast Marine*

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[6]In order to recover compensation under the Act for an injury in the course of employment, an employee must satisfy both the "status" test set forth in Section 2(3) and the "situs" test established by Section 3(a) of the Act, 33 U.S.C. 903(a). The latter provision, which is not at issue here, states that, in order to be compensable, an injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Accordingly, under the court of appeals' decision, an employee with duties similar to Boudloche's would be covered by the Act only if injured on a covered situs. He would be excluded from coverage during the bulk of his working day while driving on overland highways.

Terminal Co. v. *Caputo, supra*, 432 U.S. at 273, this Court held that workers who "spend at least some of their time in indisputably longshoring operations" qualify for "employee" status under Section 2(3). In *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 81 (1979), the Court held that land-based employees who perform "some portion" of the overall longshoring process, described as the process of moving cargo between a vessel and land transportation, satisfy the status test.

Petitioners do not dispute that in the course of his regular duties, respondent Boudloche spent at least some time performing longshoring operations. According to the Benefits Review Board's estimate, Boudloche spent as much as 5% of his working time performing the maritime functions of a longshoreman, loading and unloading cargo at docks that did not have equipment or personnel to assist him in his task (Pet. App. 18a, 20a). In addition, in order to develop good will for his employer, Boudloche was required to assist in the loading and unloading process at the remaining, fully-equipped, docks (*id.* at 4a). In sum, as the court of appeals concluded, Boudloche "regularly perform[ed] *some* portion of what was indisputably longshoring work at fully equipped docks and, for at least *some* part of his work, was required to perform the total maritime job at unequipped docks" (*id.* at 39a). This aspect of Boudloche's job was sufficient to qualify him, by occupation, as a "person engaged in maritime employment" within the meaning of Section 2(3).

The court of appeals' refusal to add a "substantial portion" gloss to this Court's language in *Caputo* and *Ford* conforms to the fundamental principle that the Act should be liberally construed in furtherance of its remedial purpose. *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414

(1932). The court's construction also serves the congressional objective, recognized by this Court, to adopt a simple, uniform standard of coverage. As the court explained in *Ford* (444 U.S. at 83-84), "a definition of maritime employment that reaches any worker who moves cargo between ship and land transportation will enable both workers and employers to predict with reasonable assurance who on the situs is protected" by the Act.

3. Petitioners nevertheless contend that respondent Boudloche falls outside the Act's coverage because his principal duty was to drive a truck (Pet. 15). They assert that this Court has specifically excluded truck drivers from coverage under the statute.[7] They rely in particular on the following passage from this Court's opinion in *Caputo* (432 U.S. at 267):

> [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.

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[7]Petitioners also state that the "lower courts and the Congressional Reports" specifically exclude truckers from coverage (Pet. 15). The committee reports on the 1972 amendments, however, do not mention truck drivers. They do state that persons engaged in the loading and unloading process are covered employees but that workers "whose responsibility is *only* to pick up *stored* cargo for further trans-shipment would not be covered * * *". S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972) (emphasis added). The sentence on which petitioners apparently rely thus does not support their submission that truck drivers may not be "employees" under Section 2(3), regardless of their role in loading and unloading vessels.

Petitioners cite (Pet. 14) only one case from the courts of appeals that refers to truck drivers. See *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F. 2d 629 (3d Cir. 1976). The Third Circuit's statement in that case

But this statement means only that the tasks ordinarily performed by truck drivers on a covered situs—picking up cargo that had previously been unloaded and stored for shipment on land, or delivering cargo for storage prior to marine shipment—do not by themselves constitute maritime employment. The Court did not suggest that any employee whose job title is "truck driver" or whose duties include driving a truck is *ipso facto* excluded from the Act's coverage. On the contrary, as discussed above, the Court held that the relevant question is whether the worker spends "at least some of [his] time" engaged in longshoring operations or other activity that qualifies as maritime employment. That test is plainly met here. Indeed, the Court in *Caputo* thought that "all would agree that persons bringing * * * cargo directly from a ship to a truck are engaged in maritime employment" (432 U.S. at 267 n.28). Accord, *P.C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 82.

4. Finally, petitioners also suggest (Pet. 12-14), without explanation, that the decision below conflicts with the decisions in *Fusco* v. *Ferini North River Associates*, 622 F. 2d 1111 (2d Cir. 1980), cert. denied, Nos. 80-639 and 80-651 (Jan. 26, 1981), and *Weyerhaeuser Co.* v. *Gilmore*, 528 F. 2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976). In those cases, the courts held that workers employed in the

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(540 F. 2d at 638) that the key to coverage is "the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing," obviously was not intended to exclude from the Act's coverage all employees who drive trucks. Indeed, *Sea-Land Service* itself involved a compensation claim filed by a worker who was injured while driving a truck on a public street. The court held that coverage turned on the precise connection between the driver's trip and water transport. The court therefore remanded to the Board for further findings on that issue. *Id.* at 639-640. See also *Warren Brothers, Inc.* v. *Nelson*, 635 F. 2d 552 (6th Cir. 1980) (truck driver covered).

construction of the foundation for a sewage treatment plant on a river and in moving logs on a saw mill pond were not engaged in maritime employment within the meaning of the Act, although their principal job duties were performed over actual navigable waters. The courts said that the work did not qualify as maritime employment because it did not bear a "significant relationship to navigation or to commerce on navigable waters" (622 F. 2d at 1113; see also 528 F. 2d at 961). As we have already informed the Court, we believe that *Fusco* and *Weyerhaeuser* applied an erroneous legal standard in determining the scope of maritime employment under the Act,[8] but, in any event, this case does not present that issue. Respondent Boudloche's duties here included loading and unloading vessels and moving cargo between vessels and his truck. These tasks manifestly bear a significant relationship to the flow of commerce on navigable waters, and Boudloche was injured during the performance of one such task. Either on the basis of his occupation, therefore, or on the basis of what he was actually doing at the time he was hurt, Boudloche satisfies the status test in Section 2(3) of the Act. See *P.C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 82 ("Persons moving cargo directly from ship to land transportation are engaged in maritime employment").

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[8]See 80-639 Brief for the Federal Respondent in Opposition at 7-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

DOJ-1981-05